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EX PARTE OF LATE FILE()

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VIA HAND DELIVERY

April 17, 2003

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION

OFFICE OF THE SECRETARY

EX PARTE

Marlene Dortch Secretary Federal Communications Commission The Portals, TW-A325 445 12th Street, S W Washington, D C 20554

Re Notice of Written *Ex Parte* Presentation CC Docket Nos 02-33. 98-10. 95-20. 01-337

Dear Ms. Dortch:

On April 17, 2003, the attached letter was delivered to Christopher Libertelli, Legal Advisor to the Chairman The purpose of the letter is to respond to a question regarding the statutory definition of "information service."

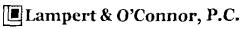
Pursuant to the Commission's Rules, eight copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,

Kenneth R. Boley

Counsel for EarthLink, Inc

cc: Christopher Libertelli



1750 K Street NW Suite 600 Washington, DC 20006

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VJA HAND DELIVERY

April 17, 2003

EX PARTE

Christopher Libertelli Office of the Chairman Federal Communications Commission 445 12th Street, S.W Washington, D.C. 20554

Re: Definition of Information Service and the *Wireline Broadband* Proceeding *Ex Parte* Presentation. CC Docket Nos. 02-33. 98-10. 95-20; 01-337

Dear Mr. Libertelli:

In response to a question that arose during our meeting on March 25,2003, EarthLink, Inc. submits this letter to explain that although the statutory definition of "information service" does not suggest the appropriate regulatory classification for the wholesale DSL transmission used by independent Internet service providers ("ISPs") to provide retail Internet access service, the Communications Act ("Act") as interpreted by the courts requires that such transmission be classified as a Title II "telecommunications service." As described below, this conclusion **flows** from the mandatory application of the NARUC I² test in construing the Act.

Section 3(20) of the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." "Telecommunications," in turn, is defined as "the

¹ The question addressed in this letter is the appropriale regulatory classification of the wholesale DSL service provided by carriers to independent ISPs. That is a separate question from the regulatory classification of the retail Internet access service that ISPs provide end-users. *See* Comments of EarthLink, Inc. in CC Dockets 02-33, 95-20, and 98-10, at 6-8 (filed May 3, 2002) ("EarthLink Comments").

² Nat'l Ass'n of Regulatory Util. Comms. v FCC, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I"). ³ 47 U \$ C. § 153(20).

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transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received."

The Act recognizes that the transmission underlying an information service—i.e. the telecommunications — may also be a "telecommunications service." Section 3(46) states that a "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Note that telecommunications service is a *type* of telecommunications, a subset distinct from other telecommunications by being offered (1) "for a fee," and (2) "directly to the public." In other words, all telecommunications services are telecommunications, but not all telecommunications are telecommunications services.

This plain-language reading is also supported by Section 254(d), which requires universal service contributions from two sets of providers of telecommunications. First, Section 254(d) mandates that every provider of "interstate *telecommunications services* shall contribute" to universal service. The statute further provides, however, that "[a]ny *ofherprovider* of interstate *telecommunications* may be required to contribute ... if the public interest so requires." Thus, Congress confirms the statutory structure of the Act, in which a subset of telecommunications providers, namely those that provide telecommunications services, are subject to obligations not necessarily imposed on "other providers" of telecommunications.

This reading is supported by the courts. For example, recognizing that telecommunications service is a subset of telecommunications, the U.S. Court of Appeals for the Third Circuit wrote that "[t]elecommunications services involve the offering of telecommunications, the transmission of information." Thus, telecommunications is not exclusive of telecommunications service, but rather is a broader category that *includes* telecommunications services

By itself, the Act's definition of "information service" as being provided "via telecommunications" does not suggest whether the transmission used to offer any particular information service is a telecommunications service. Congress only stated that an information

⁵ 47 U.S.C. § 153(46).

⁴ **47 U.S C.** § 153(43).

⁶ 47 U.S.C. § 254(d) (emphasis added)

⁷ <u>Id</u> (emphasis added).

⁸ MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d **491**, 521 (3d Cir. 2001). cert. denied, Pennsylvania Pub Util. Cornm. v. MCJ Telecommunications, 123 S. Ct. 340 (2002).

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service must ride over telecommunications, regardless of whether that transmission is also a telecommunications service.

Although the definition of "information service" in Section 3(20) does not specify the classification of the transmission used to provide the information service, the law as applied to the facts at issue in this proceeding *does* mandate a particular outcome. Under the courts' interpretation of the Act, the wholesale DSL transmission purchased by independent ISPs and used to provide the retail information service called broadband Internet access *is* a telecommunications service.

In an effort to define "common carrier" as used in the pre-1996 Act (which, as explained below, carries the same meaning as a provider of a "telecommunications service"), the U.S. Circuit Court of Appeals for the District of Columbia in NARUC I looked to "the common law of carriers to construe the Act," arriving at the now-familiar test of whether the carrier "hold[s] [it]self out to serve indiscriminately." This common law test, as refined in NARUC I and its progeny, cannot be changed by the Commission: "The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications carriers." As explained by the court, once a carrier is determined to be a common carrier, "then the Commission must determine its responsibilities from the language of the Title II common carrier provisions.""

Today, the <u>NARUC I</u> test continues to control regulatory classifications under the Act, even after the changes made by the Telecommunications Act of 1996. In <u>Virgin Islands</u>, the D.C. Circuit affirmed the Commission's holding that "the definition of 'telecommunications services' in the 1996 Act was 'intended to clarify that telecommunications services are common carrier services." In other words, the question in this proceeding of whether wholesale DSL service used by independent ISPs to provide retail broadband Internet access is a telecommunications service is *still* determined by application of the Act as interpreted by the courts in <u>NARUC I</u> and subsequent cases. Application of the <u>NARUC I</u> analysis is *mandatory*, and, as EarthLink has expressed in its filings in this proceeding, wholesale DSL transmission provided to independent

⁹ NARUC I at **642**.

^{&#}x27;"Ld at 644.

¹¹ Id.

¹² <u>Virgin Islands Tel Corp v FCC</u>, 198 F 3d 921, 926 (D C Cir 1999)("<u>Virgin Islands</u>") (citing *Cable & Wireless*, *PLC*, 12 FCC Rcd 8516, ¶¶ 14-15 (1997))

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ISPs and used for the provision of retail broadband Internet access service cannot emer from a NARUC I analysis as anything other than a telecommunications service. ¹³

EarthLink looks forward to the opportunity to explore these issues with you in greater detail and to discuss further why the Act requires the continued regulation of wholesale DSL transmission provided to independent ISPs as a "telecommunications service." In accordance with the commission's *ex parte* rules, an original and eight copies of this letter have been provided to the Commission Secretary for inclusion in the above-referenced dockets.

Sincerely,

Mark J. O'Connor Kenneth R. Boley

Counsel for Earth Link, Inc

¹³ EarthLink Comments at 17-20; **Reply** Comments of EarthLink, *Inc.* in CC Dockets 02-33, 95-20, and 98-10, at 23-25 (tiled luly 1, 2002)